No. 83-1680

In The
Supreme Court of the United States
October Term, 1983

LAWRENCE LAWLESS,

Petitioner,

v.

ROBERT PIERCE, MARY LOU MARZUKI, ARLENE KAGANOVE, EUGENE SCHWARTZ, FRED HENIZE, TIM WARREN, CHARLES NOTARUS, JOE MEREDITH, JON MENDELSON, THORN CREEK PRESERVATION ASSOCIATION, VILLAGE OF PARK FOREST, VILLAGE OF PARK FOREST SOUTH, FOREST PRESERVE DISTRICT OF WILL COUNTY, AND OTHERS WHOSE NAMES ARE PRESENTLY UNKNOWN TO THE PLAINTIFF,

Respondents.

BRIEF IN OPPOSITION FOR CERTAIN RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE JUDGMENT OF THE ILLINOIS APPELLATE COURT, FIRST DISTRICT, INASMUCH AS THAT JUDGMENT WAS BASED ON AN INDEPENDENT AND ADEQUATE STATE GROUND.

A. Whether the Judgment and Opinion Sought To Be Reviewed Is Supported by an Independent and Adequate State Ground, Namely, that Petitioner's Causes of Action for Trespass Are Barred by the Doctrine of Election of Remedies.

B. Whether Although the State Court's Opinion Relies on Similar Provisions in Both the State and Federal Constitutions, the State Constitutional Provision Provides an Independent and Adequate Ground of Decision.

II. WHETHER UNDER SUPREME COURT RULE 17.1(b), THE PETITION SHOULD BE GRANTED ON THE BASIS THAT A STATE COURT OF LAST RESORT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT.

PARTIES TO THE PROCEEDING

The petitioner is Lawrence Lawless.

The respondents are Robert Pierce, Mary Lou Marzuki, Arlene Kaganove, Eugene Schwartz, Charles Notarus, Joe Meredith, Thorn Creek Preservation Association, Village of Park Forest, and Village of Park Forest South.

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B. Although the State Court's Opinion Relies on Similar Provisions in Both the State and Federal Constitutions, the State Constitutional Provision Provides an Independent and Adequate Ground of Decision. 12

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No. 83-1680

In The

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LAWRENCE LAWLESS,

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v.

ROBERT PIERCE, MARY LOU MARZUKI, ARLENE KAGANOVE, EUGENE SCHWARTZ, FRED HENIZE, TIM WARREN, CHARLES NOTARUS, JOE MEREDITH, JON MENDELSON, THORN CREEK PRESERVATION ASSOCIATION, VILLAGE OF PARK FOREST, VILLAGE OF PARK FOREST SOUTH, FOREST PRESERVE DISTRICT OF WILL COUNTY, AND OTHERS WHOSE NAMES ARE PRESENTLY UNKNOWN TO THE PLAINTIFF,

Respondents.

BRIEF IN OPPOSITION FOR CERTAIN RESPONDENTS

Respondents, Robert Pierce, Mary Lou Marzuki, Arlene Kaganove, Eugene Schwartz, Charles Notarus, Joe Meredith, Thorn Creek Preservation Association, Village of Park Forest, and Village of Park Forest South, respectfully pray that this Court deny the petition for a writ of certiorari to review the judgment and opinion of the Illinois Appellate Court, First Judicial District in

this proceeding on September 6, 1983, as modified on denial of rehearing on November 1, 1983, and the denial of petitioner's petition for leave to appeal to the Illinois Supreme Court on January 31, 1984.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Illinois Appellate Court, First Judicial District, in *Lawless v. Pierce,* 118 Ill. App. 3d 747, 455 N.E.2d 113 (1983) appears in petitioner's appendix at pages A1-8. The appellate court affirmed the dismissal of plaintiff's amended complaint by the circuit court of Cook County on July 14, 1982 (R. 44-45; C. 623). In reaching that conclusion, the appellate court considered an earlier opinion by the Illinois Appellate Court, Third Judicial District, in *Dept. of Conservation v. Lawless,* 100 Ill. App. 3d 74, 426 N.E.2d 545 (1981), which appears in petitioner's appendix at pages C1-9. The supreme court of Illinois denied petitioner's petition for leave to appeal on January 31, 1984; a copy of that order is included in petitioner's appendix at page B-1.

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. §1257(3) for review by certiorari of the judgment and opinion of the decision of the First District Appellate Court, which petitioner claims became "a final judgment or decree rendered by the highest Court of a State in which a decision could be had" by reason of the denial of

petitioner's petition for leave to appeal to the supreme court of Illinois on January 31, 1984.

Respondents claim that this Court is without jurisdiction to entertain this petition for a writ of certiorari for the reason that the judgment and opinion of the appellate court rested on independent and adequate state grounds (to be discussed *infra.*)

RESPONDENTS' STATEMENT OF THE CASE

Petitioner correctly points out that the facts material to the consideration of the questions presented in the petition are well summarized by the First District Illinois Appellate Court in its modified opinion (Petitioner's Appendix, at pages A3-4); and that the issues presented by the petition require a consideration of the judgment and opinion of the court below as well as the judgment and opinion of the Illinois Appellate Court, Third District, in *Department of Conservation v. Lawless,* 100 Ill. App. 3d 74, 426 N.E.2d 545 (1981) (Petitioner's Appendix, at pages C3-4). In Appendix D to his petition, petitioner sets forth the statement of facts contained in his appellant's brief in this cause. Respondents accept the statement of facts contained in the petition as accurate. However, in order to fully and fairly apprise this Court of the sequence of events which gives rise to this petition, respondents deem it necessary to briefly set forth the following additional facts.

Prior to the commencement of the present action, on June 27, 1978, petitioner filed a complaint in mandamus in

the Circuit Court of Will County against David Kinney, Director of Conservation, seeking to compel the Illinois Department of Conservation (the "Department") to proceed by condemnation to purchase his property (C. 219-23). The Department failed to answer or appear, and the trial court issued a writ of mandamus on August 9, 1978 (C. 224-26). The mandamus order contains the following findings of fact: that in August, 1972, the Department scheduled petitioner's property for taking as part of a conservation development project known as Thorn Creek Woods; that in January, 1976, and on January 31, 1978, the Department notified petitioner of its intent to acquire his property by eminent domain; and that the Department had, from time to time until January 31, 1978, declared that petitioner's property was essential to the development project (C. 224, par. 1).

The mandamus order likewise contained a finding that on June 4, 1978, a public dedication ceremony was held by the Department, to which members of the public were invited, and petitioner's property was advertised as public property; and that these actions constituted a *de facto* "taking" of petitioner's property without compensation in violation of Section 1 of the Eminent Domain Act (Ill. Rev. Stat. 1977, ch. 47, par. 1) (C. 225, pars. 2, 4). Accordingly, the Department was ordered to proceed by eminent domain in the purchase of petitioner's property (C. 225).

The Department subsequently filed a petition to condemn petitioner's property on July 28, 1978. It is important to note, and petitioner fails to point this out in his petition, that following a jury trial on June 23, 1980, he received an award of $180,000 as just compensation for the taking of his property (a four-acre tract of land). Judgment was entered on the verdict. (*See Department of Conservation v. Lawless,* Petitioner's Appendix, at page C4; *Lawless v. Pierce,* Petitioner's Appendix at pages A3-4).

Petitioner and the Department thereafter prosecuted a consolidated appeal to the Illinois Appellate Court, Third District, in *Department of Conservation v. Lawless,* 100 Ill. App. 3d 74, 426 N.E.2d 545 (1981). The court rejected Lawless's contention that he was entitled to statutory interest from June 4, 1978 until June 26, 1980. The court reasoned that, although the mandamus court found a "taking" of the Lawless property on June 4, 1978, petitioner remained in actual possession of the condemned property until June 26, 1980, the date the jury returned its verdict. Since Lawless retained actual, physical possession of the condemned property up until the time of the verdict and judgment and the Department did not obstruct his occupancy or continued use of such property, the court found that Lawless was not entitled to pre-judgment interest. The court likewise rejected Lawless's claim for mortgage interest as an element of just compensation under the Illinois and Federal constitutions.

Petitioner commenced the present action on January 29, 1980 by filing a two-count complaint. Count I alleged

trespass, conspiracy to commit trespass and willful and wanton misconduct; Count II alleged a violation of the Illinois Antitrust Act (C. 2-19). Respondents' motions to dismiss (C. 200-27, 311-43) were granted, without prejudice (C. 508), and petitioner filed an amended complaint on December 15, 1981 (C. 509-20).

The amended complaint alleged causes of action for trespass to property (Count I); willful trespass to property (Count II); conspiracy and trespass in violation of the Illinois Antitrust Act (Count III); and conspiracy and trespass to private property at common law with allegations of willful misconduct (Count IV) (C. 511-18).

The allegations of the amended complaint may be briefly summarized as follows: Count I charged respondents with trespass, in that respondents sponsored and advertised a public dedication ceremony on June 4, 1978, whereby petitioner's property was publicly represented, and the respondents continued to so portray petitioner's property until January 28, 1981; that respondents conducted "nature walks" over and across petitioner's property during the same period; and that members of the public were thereby induced to trespass upon petitioner's property from time to time until January 28, 1981. Count II averred that respondents' actions in representing petitioner's private property as public property were willful, and sought punitive damages; Count III alleged that respondents' actions in converting petitioner's property to public property were violative of the Illinois Antitrust Act; and Count IV charged that respondents' actions were willful, and constituted a conspiracy to commit trespass at common law (C. 511-14).

Respondents again filed motions to dismiss the amended complaint (C. 521-25, 528-29, 534-55). The trial court granted respondents' motion. Primarily, the court reasoned that petitioner's causes of action for trespass were barred under the doctrine of election of remedies (R. 44-45, C. 641). From the order entered July 14, 1982 (C. 623), petitioner prosecuted an appeal to the First District Appellate Court (C. 625-29).

The First District Appellate Court affirmed the trial court's ruling that petitioner's causes of action as set forth in his amended complaint were barred by the doctrine of election of remedies. The court found that it had been judicially determined by the Third District Appellate Court that the date of the "taking" of plaintiff's property was June 4, 1978, the date of the public dedication ceremony; and that plaintiff retained actual possession of the property between June 4, 1978 and the date of the condemnation verdict on June 26, 1980. (The court likewise noted that in his briefs in the third district, petitioner did not disagree with the action of the trial court in the *mandamus* action of establishing June 4, 1978 as the date of "taking." From that the court reasoned that petitioner's attempt to recover for the alleged trespasses from June 4, 1978 must fail since they were the very acts which constituted the "taking" for which petitioner had already received compensation in the condemnation award. Accordingly, the court concluded that petitioner, having received "just compensation" as required by the Fifth Amendment to the United States Constitution and Section 15 of Article I of the Illinois Constitution, was not entitled to recover additional compensation by joining different defendants, and by bringing the action under the theory of trespass to property which, by operation of law, he did not hold title.

Petitioner's petitions for rehearing and for leave to appeal to the supreme court of Illinois were denied.

REASONS FOR DENYING THE WRIT

I. THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE JUDGMENT OF THE ILLINOIS APPELLATE COURT, FIRST DISTRICT, INASMUCH AS THAT JUDGMENT WAS BASED ON AN INDEPENDENT ADEQUATE STATE GROUND.

A. The Judgment and Opinion Sought to be Reviewed Is Supported by An Independent and Adequate State Ground, Namely, that Petitioner's Causes of Action for Trespass are Barred by the Doctrine of Election of Remedies.

The Court's certiorari jurisdiction over decisions from state courts derives from 28 U.S.C. §1257, which provides that "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari, where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States." *Illinois v. Gates*, — U.S. —, 76 L. Ed. 2d 527, 535, 103 S. Ct. 2317 (1983). The principle has been long recognized that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, this court's jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Michigan v. Long* — U.S. —, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983); *Zacchini v.*

Scripps-Howard Broadcasting Co., 433 U.S. 562, 53 L. Ed. 2d 965, 97 S. Ct. 2849 (1977); *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 13 L. Ed. 2d 439, 85 S. Ct. 493 (1965); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L. Ed. 2d 285, 82 S. Ct. 275 (1961); *Fox Film Corp. v. Muller*, 296 U.S. 207, 80 L. Ed. 158, 56 S. Ct. 183 (1935). This court's power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights; that power is to correct them, not to revise opinions. *Zacchini v. Scripps-Howard Broadcasting Co.*, 53 L. Ed. 2d 965, 970. Respect for the independence of state courts, as well as the avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. The jurisdictional concern is that the Court avoid rendering an advisory opinion, and if the same judgment would be rendered by the state court after this Court corrected its views of federal laws, this Court's review could amount to nothing more than an advisory opinion. *Michigan v. Long*, 77 L. Ed. 2d 1201, 1215; *Zacchini v. Scripps-Howard Broadcasting Co.*, 53 L. Ed. 2d 965, 970; *Herb v. Pitcairn*, 324 U.S. 117, 125-26, 89 L. Ed. 2d 789, 65 S. Ct. 459 (1945).

A review of the First District Appellate Court's decision in *Lawless v. Pierce* clearly and expressly indicates that it is based on bona fide separate adequate, and independent grounds, and therefore this court should not undertake to review the decision. Relying primarily upon *Grunewald v. City of Chicago*, 371 Ill. 528, 28 N.E.2d 739 (1939), the Court affirmed the trial court's ruling that petitioner was barred from bringing the cause of action based upon the doctrine of election of remedies. The court reasoned that petitioner had two options available

to him when he was faced with the situation of the alleged unlawful trespass to his land. He could have sued at common law for damages, or proceeded in *mandamus* to compel eminent domain proceedings. He chose the latter remedy, resulting in a condemnation award of $180,000, which included a valuation of his property as of the date of "taking", that is, the same date which he claimed the alleged trespass began.

In reaching that conclusion, the appellate court rejected petitioner's theory, as here, that since he retained exclusive possession of his property from June 4, 1978 until the date the condemnation award was paid, he should be compensated for the alleged trespasses upon his land during that period. The court reasoned that the first instance of trespass alleged by petitioner was on June 4, 1978, which was the same date used by the court in the condemnation action as the "taking" date. Therefore, stated the court, the damages which petitioner allegedly sustained for the acts of trespass were included in the compensation award. The court further noted, as petitioner acknowledged in his brief in the appellate court, that once payment of a compensation award is made by the State, its title relates back to the date of taking. When the State paid the award on January 28, 1981, its title related back to June 4, 1978. Since the State's title vested as of June 4, 1978, the court stated that petitioner's attempt to recover for the alleged tortious acts of defendants from that date on must fail because "they are the very acts which constituted the 'taking' for which [petitioner] has already received compensation". (118 Ill. App. 3d, 747, 752; Petitioner's Appendix, at page A-6).

Petitioner's argument here that damages for injury to his possessory rights were not included in the compen-

sation award is contrary to the First District Appellate Court's decision and the applicable Illinois case law. The appellate court correctly determined that petitioner's action was barred under the doctrine of election of remedies. *See also, Rotogravure Service, Inc. v. R. W. Borrowdale Co.*, 77 Ill. App. 3d 518, 395 N.E.2d 1143 (1979); *Altom v. Hawes*, 63 Ill. App. 3d 659, 380 N.E.2d 7 (1978); *Kaszab v. Metropolitan State Bank* 264 Ill. App. 358, 363 (1932); 28 C.J.S. *Election of Remedies* §14 (1941). There is little question here but that the remedies pursued by petitioner were inconsistent and that petitioner, under the doctrine of election of remedies, could not, after making his choice, resort to an action for damages for trespass. The instant case well illustrates the old adage that one "cannot have [his] cake and eat it too." By his election to proceed in *mandamus* and prosecuting his suit to a final conclusion, petitioner was precluded from afterwards suing these respondents for trespass. *Kaszab v. Metropolitan State Bank*, 264 Ill. App. 358, 368. Moreover, where, as here, the facts which give rise to the causes of action are identical, a compelling reason exists for application of the doctrine of election of remedies. Having elected the latter remedy, satisfaction of his claim in the eminent domain proceeding constituted a bar to the present action.

Respondents respectfully submit that the decision of the Illinois Appellate Court rests upon independent and adequate state grounds, thereby precluding review by this Court. It has been stated that this Court accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, and its findings are customarily accepted in the absence of "exceptional circumstances". *California Retail Liquor Deal-*

ers Ass'n v. Midcal Aluminum, 445 U.S. 97, 63 L. Ed. 2d 233, 247, 100 S. Ct. 937 (1980).

B. Although the State Court's Opinion Relies on Similar Provisions in both the State and Federal Constitutions, the State Constitutional Provision Provides an Independent and Adequate Ground of Decision.

As petitioner points out, the appellate court rejected his claim that the dismissal of his complaint resulted in the denial of compensation for the taking of his property as guaranteed by the U.S. and Illinois Constitutions. U.S. Const., amend. V; Ill. Const. 1970, art. I, §15. The court found that petitioner, having received just compensation as required by the federal and Illinois Constitutions, was not entitled to recover additional compensation by joining different defendants, and by bringing an action under the theory of trespass to property for which, by operation of law, he did not hold title. (118 Ill. App. 3d 747, 753; Petitioner's Appendix, at page A-7). Respondents maintain that this Court's jurisdiction fails for the additional reason that, notwithstanding the fact that the appellate court's opinion relies on similar provisions in both the State and Federal Constitutions, Section 15 of Article I of the Illinois Constitution provides an independent and adequate ground of decision.

It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds. *Fay v. Noia,* 372 U.S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963). Furthermore, this Court has jurisdiction to review only if the federal ground is the *sole* basis for the decision, or the State Constitution was interpreted under what the state court deemed the com-

pulsion of the Federal Constitution. It has been stated that this Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review must show that this Court has jurisdiction of the case. *Dept. of Mental Hygiene of Cal. v. Kirchner*, 380 U.S. 194, 13 L. Ed. 2d 753, 756-57, 85 S. Ct. 871 (1965).

In the appellate court petitioner relied on the just compensation requirement of the Illinois Constitution as well as the Fifth Amendment to the United States Constitution. In resolving the constitutional issue raised, the appellate court, quite understandably, did not analyze separately the effect of the two provisions but considered them together. Notwithstanding petitioner's assertions to the contrary, the language of the opinion indicates that, at the least, state law is an equal ground of decision. There is no intimation that the court's conclusion is based less forcefully on the Illinois Constitution than on the Fifth Amendment. Under such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision, depriving this court of jurisdiction to review the state judgment. *Jankovich v. Indiana Toll Rd. Comm.*, 378 U.S. 487, 13 L. Ed. 2d 439, 85 S. Ct. 493 (1965). Further, it is fundamental that state courts be left free and unfettered by this Court in interpreting their state constitutions. *Michigan v. Long*, — U.S. —, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983).

Even assuming *arguendo* that this Court has jurisdiction to review the state court judgment, respondents submit that petitioner was fully compensated for all damages

to his property, including the alleged prior trespasses, when he received an award of $180,000 in the eminent domain proceeding. Accordingly, there is no federal question presented for review by this Court. Since this court has no supervisory authority over state courts, review is confined to whether there is a constitutional violation. *Chandler v. Florida,* 449 U.S. 560, 66 L. Ed. 2d 740, 757, 101 S. Ct. 802 (1981). There is no constitutional violation in the present case because petitioner received "just compensation" for the taking of his property as required by the State and Federal Constitutions. Petitioner can hardly dispute the adequacy of the just compensation award and, indeed, the record reveals that he has not attempted to do so.

II. UNDER SUPREME COURT RULE 17.1(b) THE PETITION SHOULD NOT BE GRANTED ON THE BASIS THAT A STATE COURT OF LAST RESORT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT.

Petitioner premises his claim that review is warranted by this court on Supreme Court Rule 17.1(b), which provides as material, that:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> • • •
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

Petitioner argues that the decisions of the Illinois Appellate Courts of the First and Third Districts are both final judgments of "the highest court of a State in which a decision could be had," (28 U.S.C. §1257) since the Illinois supreme court denied petition for leave to appeal in both cases. Plaintiff further argues that the appellate court decisions are conflicting because they make opposite rulings on the issues of possession and compensation, thereby destroying his constitutional rights. The gist of petitioner's argument is that he was deprived of his constitutional rights because he was denied prejudgment interest by the Third District Appellate Court and damages for trespass by the First District Appellate Court. This identical argument was raised by petitioner in his petition for rehearing, which was denied by the appellate court. In rejecting petitioner's contention, the court stated:

> Plaintiff, however, misreads our decision. We concluded that plaintiff, by pursuing the mandamus action, was now barred from bringing this action for damages because of the doctrine of election of remedies. In his petition for rehearing, plaintiff urges that in addition to the eminent domain award, he is entitled to either prejudgment interest, which was denied by the third district, or damages for an alleged trespass. We find no authority to support plaintiff's intriguing theory that he is entitled to compensation twice under the reasoning he advances. 118 Ill. App. 3d 747, 753. (Petitioner's Appendix, at pages A7 to A8).

The appellate court's reasoning as set forth above is correct and demonstrates that there exists no conflict between the two decisions in this matter which warrants this court's review.

Finally, no federal question is presented under either the Illinois or Federal Constitution since petitioner's action for the alleged trespasses is a common law action for damages and is governed by rules of procedure, and jurisdiction on appeal, as other common law actions for damages are governed. *See Grunewald v. City of Chicago,* 371 Ill. 528, 21 N.E. 2d 739 (1959). As has frequently been stated, the writ of certiorari "is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Supreme Court Rule 17.1; *Fay v. Noia,* 372 U.S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963). No special and important reasons have been presented by petitioner in the present case.

CONCLUSION

Inasmuch as there are no special or important reasons for reviewing the case, the petition for a writ of certiorari to review the judgment and opinion of the Illinois Appellate Court, First Judicial District, should be denied.

Respectfully submitted,

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